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 15 Impulse Marketing Group, Inc.

16 **IN THE UNITED STATES DISTRICT COURT**  
 17 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
 18 **AT RICHLAND**

19 JAMES S. GORDON, JR.,  
 20 an individual residing in  
 21 Benton County, Washington,  
 22 Plaintiff,

23 vs.

24 IMPULSE MARKETING GROUP, INC.,  
 25 A Nevada Corporation,  
 26 Defendant.

27 IMPULSE MARKETING GROUP, INC.,  
 28 Third-Party Plaintiff,

29 vs.

30 BONNIE GORDON, JAMES S. GORDON, III,  
 31 JONATHAN GORDON, JAMILA GORDON,  
 32 ROBERT PRITCHETT, and EMILY ABBEY,  
 33 Third-Party Defendants.

34 **No. CV-04-5125-FVS**

35 **DEFENDANT'S RESPONSE TO**  
 36 **PLAINTIFF'S STATEMENT OF**  
 37 **MATERIAL FACTS AND**  
 38 **MOTION TO STRIKE**  
 39 **STATEMENT OF FACTS**

40 **DATE: October 14, 2005**

41 Defendant's Response to Plaintiff's Statement of Material Facts  
 42 and Motion to Strike Statement of Facts - 1

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### Motion to Strike Plaintiff's Statement of Facts

Defendant Impulse Marketing Group, Inc. ("Impulse" or "Defendant") hereby moves to strike the Rule 56.1 Statement of Facts (the "Statement") submitted by plaintiff James Gordon ("Plaintiff" or "Gordon") based upon: (1) the form and content of the Statement; and (2) Plaintiff's lack of standing to submit the Statement on behalf of third-party defendants Bonnie Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert Pritchett and Emily Abbey ("Third-Party Defendants").

Local Rule 56.1(a) provides, in pertinent part, that "any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts relied upon in support of the motion. The specific facts shall be set forth in **serial fashion and not in narrative form**. (emphasis added). Plaintiff's Statement violates Local Rule 56.1(a) because the Statement: (1) fails to set forth Plaintiff's Facts in a serial fashion; (2) contains narrative and comment; and (3) includes inappropriate arguments and legal conclusions.

Pursuant to Rule 56, the purpose of Local Rule 56 is to "free district courts from the need to hunt through voluminous records without guidance from the

1 parties," See e.g., Holtz v. Rockefeller & Co., 258 F.3d 62, 74 (2d Cir. 2001).  
2  
3 Plaintiff has frustrated this purpose and wasted judicial economy by submitting a  
4 Statement that contains legal conclusions, hearsay, immaterial facts, argument and  
5 comment in violation of Local Rule 56.1(a).  
6

7 As set forth more fully in our opposition to Plaintiff's Motion to dismiss  
8 Impulse's Amended Counterclaims and Third-Party Amended Complaint, Gordon  
9 lacks standing to submit the Statement on behalf of the Third-Party Defendants  
10 because: (1) Gordon does not have a personal stake in the outcome of the third-party  
11 action; (2) there is no direct relationship between the factual claims asserted against  
12 Gordon and those brought against Third-Party Defendants; (3) Gordon cannot bind  
13 Third-Party Defendants to his representations, admissions and positions; and (4) the  
14 interests of Gordon and Third-Party Defendants may vary.  
15  
16

17  
18 In view of the foregoing, Defendant respectfully requests that this Court:

- 19 1. Strike the Statement in its entirety;  
20 2. Award Defendant its attorneys' fees and costs associated with  
21 responding to Plaintiff's Statement; and  
22 3. Grant such other and further relief as this Court deems  
23 appropriate.  
24  
25

## Counter-Statement of Facts

Notwithstanding the foregoing motion to strike Plaintiff's Statement in its entirety, Defendant hereby submits the following response to the Statement. Please be advised that Defendant did not correct any typographical errors contained in the Statement. Therefore, Defendant only responds to Plaintiff's Facts and not to any legal conclusions, hearsay, narrative, comment or argument contained in the Statement.

For purposes of streamlining Defendant's response to Plaintiff's Statement, please be advised that: (a) Defendant's Amended Answer ¶¶ 3.1-3.12.3 generally denies Plaintiff's Statement in its entirety or denies sufficient knowledge or information to respond to Plaintiff's allegations; (b) Plaintiff has refused to provided Defendant with any emails he allegedly received that he claims violate Washington law; and (c) there has been no discovery whatsoever in this lawsuit. Based on the foregoing, there are several questions of material fact that need to be resolved prior to the granting of summary judgment pursuant to Rule 56. Such questions include, but are not limited to:

- Whether or not Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue;
- Whether or not Defendant transmitted the alleged emails at issue;

Defendant's Response to Plaintiff's Statement of Material Facts  
and Motion to Strike Statement of Facts - 4

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- Whether or not the emails at issue violated Washington law;
- Whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and
- Whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners.

To prevail on a motion for summary judgment the evidence must reveal no genuine issue of material fact when viewed in the light most favorable to the party opposing summary judgment. S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 466 (9th Cir 2001). The court in S.D. Meyers, Inc., stated that the threshold inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." S.D. Meyers, Inc. at 466. In making this determination, a court must view the evidence in the light most favorable to the non-moving party. Eichacker v. Paul Revere Life Ins. Co., 354 F.3d 1142, 1145 (9th Cir. 2004).

1 Plaintiff's Fact #1:

2 On or about May of 1998, Mr. Gordon registered the domain name  
3  
4 "gordonworks.com" and began using it to make information relating to job  
5 searching and career development available to the general public on the internet.

6 Mr. Gordon also began using the email address [gordonworks@gordonworks.com](mailto:gordonworks@gordonworks.com).

7  
8 Gordon Declaration ¶ 2.

9  
10  
11 Response:

12 Based upon the lack of any discovery in this lawsuit, Defendant denies  
13 knowledge or information as to Plaintiff's Fact #1. Defendant's Amended Answer  
14 ¶¶ 3.1-3.4. Notwithstanding the foregoing, Plaintiff's Fact #1 is immaterial to  
15 Plaintiff's Motion for Summary judgment to dismiss Defendant's amended  
16 counterclaims and third-party amended complaint ("Plaintiff's Motion").  
17  
18

19 Plaintiff's Fact #2:

20 In addition to the email address "gordonworks@gordonworks.com" Mr. Gordon  
21 created numerous other email addresses, all using the gordonworks.com domain.  
22  
23 These included msm@gordonworks.com, cash@gordonworks.com,  
24 goals@gordonworks.com, business@gordonworks.com, jobs@gordonworks.com,  
25

1 marketer@gordonworks.com, localbusiness@gordonworks.com,  
2 peace@gordonworks.com, postmaster@gordonworks.com,  
3 referral@gordonworks.com, webmaster@gordonworks.com,  
4 genesis@gordonworks.com, teen@gordonworks.com, telecom@gordonworks.  
5  
6 Gordon Declaration, ¶ 4.

7  
8 Response:

9  
10 Based upon the lack of any discovery in this lawsuit, Defendant denies  
11 knowledge or information as to Plaintiff's Fact #2. Defendant's Amended Answer  
12 ¶¶ 3.1-3.4.

13  
14 Plaintiff's Fact #3:

15 Many of these email addresses were published on the internet on various web  
16 pages Mr. Gordon created. Gordon Declaration, ¶ 5.

17  
18 Response:

19 Based upon the lack of any discovery in this lawsuit, Defendant denies  
20 knowledge or information as to Plaintiff's Fact #3. Defendant's Amended Answer  
21 ¶¶ 3.1-3.4. Notwithstanding the foregoing, Plaintiff's Fact #3 is immaterial to  
22 Plaintiff's Motion.

23  
24 Plaintiff's Fact #4:

25  
26 Defendant's Response to Plaintiff's Statement of Material Facts  
27 and Motion to Strike Statement of Facts - 7

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1 Almost as soon as each of these email addresses was published on the  
2 internet, Mr. Gordon began receiving commercial email at these addresses. Gordon  
3 Declaration, ¶ 5.  
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26 Defendant's Response to Plaintiff's Statement of Material Facts  
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1 Response:

2       Genuine issues of material fact exist regarding Plaintiff's Fact #4.  
3  
4 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,  
5 Third-Party Defendants, or anyone else allegedly received the commercial e-mail  
6 messages at issue; (b) whether or not Defendant transmitted the alleged emails at  
7 issue; (c) whether or not the emails at issue violated Washington law; (d) whether  
8 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing  
9 partners, with untruthful and inaccurate registration information; and (e) whether  
10 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse  
11 and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. The Court  
12 is respectfully further referred to the Gordon Initial Disclosures in the Related  
13 Action (the "Gordon Initial Disclosures") attached to the Declaration of James  
14 Bodie, dated September 23, 2005 (the "Bodie Declaration"), of which this Court has  
15 taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey,  
16 rather than Gordon himself, received commercial e-mail. (emphasis added). As the  
17 Gordon Initial Disclosures were subject to F.R.C.P. § 11 requiring, at the time of the  
18 disclosure, reasonable inquiry and evidentiary support, the contradictory  
19 representations in the Gordon Declaration and the Gordon Initial Disclosures raises  
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26 Defendant's Response to Plaintiff's Statement of Material Facts  
27 and Motion to Strike Statement of Facts - 9

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1 triable issues of material fact in this third-party action and counterclaims.

2 Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

3  
4 Plaintiff's Fact #5:

5 The addresses for Mr. Gordon's family members, bonnie@gordonworks.com,  
6 jay@gordonworks.com, jamila@gordonworks.com, jonathan@gordonworks.com,  
7 jim@gordonworks.com, james@gordonworks.com, were all published on the  
8 internet on web pages Mr. Gordon built for his family. Gordon Declaration, ¶ 6.

9  
10  
11 Response:

12 Based upon the lack of any discovery in this lawsuit, Defendant denies  
13 knowledge or information as to Plaintiff's Fact #5.

14  
15 Plaintiff's Fact #6:

16 Although the web pages are related to Mr. Gordon's family members, all of  
17 them were created and maintained by Mr. Gordon, and email sent to any of these  
18 email addresses is and was received by Mr. Gordon. Gordon Declaration, ¶ 7.

19  
20 Response:

21  
22 Genuine issues of material fact exist regarding Plaintiff's Fact #6.  
23 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,  
24 Third-Party Defendants, or anyone else allegedly received the commercial e-mail  
25

1 messages at issue; (b) whether or not Defendant transmitted the alleged emails at  
 2 issue; (c) whether or not the emails at issue violated Washington law; (d) whether  
 3 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing  
 4 partners, with untruthful and inaccurate registration information; and (e) whether  
 5 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse  
 6 and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. Further,  
 7 the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie  
 8 Declaration, of which this Court has taken judicial notice, that provides, *inter alia*,  
 9 Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial  
 10 e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were  
 11 subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry  
 12 and evidentiary support, the contradictory representations in the Gordon Declaration  
 13 and the Gordon Initial Disclosures raises triable issues of material fact in this third-  
 14 party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

15 Plaintiff's Fact #7:

16 In response to commercial emails purporting to offer free products, on or  
 17 about September 1, 2003, Mr. Gordon requested to receive the free products  
 18 advertised in these offers. Gordon Declaration, ¶¶ 8 & 9.

1 Response:

2 Based upon the lack of any discovery in this lawsuit, Defendant denies  
3 knowledge or information as to Plaintiff's Fact #7.

4 Plaintiff's Fact #8:

5 These submissions were made by visiting a website advertised in these emails,  
6  
7 and entering an email address and other information into an online form. Mr.  
8 Gordon used the following email addresses james@gordonworks.com,  
9 faye@gordonworks.com, jamila@gordonworks.com, jay@gordonworks.com,  
10 jonathan@gordonworks.com, emily@gordonworks.com Gordon Declaration, ¶ 9.

11 Response:

12 Based upon the lack of any discovery in this lawsuit as well as Plaintiff's  
13 refusal to provide Defendant's with the alleged violative emails, Defendant denies  
14 knowledge or information as to Plaintiff's Fact #8. Notwithstanding the foregoing,  
15 genuine issues of material fact exist regarding Plaintiff's Fact #8. Specifically, there  
16 are genuine issues of material fact as to: (a) whether Gordon, Third-Party  
17 Defendants, or anyone else allegedly received the commercial e-mail messages at  
18 issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c)  
19 whether or not the emails at issue violated Washington law; (d) whether Gordon

1 and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with  
 2 untruthful and inaccurate registration information; and (e) whether Gordon and/or  
 3 Third-Party Defendants misrepresented their identities to Impulse and/or its  
 4 marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. Further, the Court  
 5 is respectfully referred to the Gordon Initial Disclosures attached to Bodie  
 6 Declaration, of which this Court has taken judicial notice, that provides, *inter alia*,  
 7 Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial  
 8 e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were  
 9 subject to F.R.C.P. § 11 requiring, at the time of the disclosure, reasonable inquiry  
 10 and evidentiary support, the contradictory representations in the Gordon Declaration  
 11 and the Gordon Initial Disclosures raises triable issues of material fact in this third-  
 12 party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

13 Plaintiff's Fact #9:

14 Mr. Gordon never received any of the free products advertised in the emails.

15 Response:

16 Based upon the lack of any discovery in this lawsuit as well as Plaintiff's  
 17 refusal to provide Defendant with the alleged violative emails, Defendant denies  
 18 knowledge or information as to Plaintiff's Fact #9 and Plaintiff's Fact #9 is

1 immaterial to Plaintiff's Motion. Further, there are genuine issues of material fact  
2 as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly  
3 received the commercial e-mail messages at issue; (b) whether or not Defendant  
4 transmitted the alleged emails at issue; (c) whether or not the emails at issue violated  
5 Washington law; (d) whether Gordon and/or Third-Party Defendants provided  
6 Impulse, and/or its marketing partners, with untruthful and inaccurate registration  
7 information; and (e) whether Gordon and/or Third-Party Defendants misrepresented  
8 their identities to Impulse and/or its marketing partners. Further, the Court is  
9 respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration,  
10 of which this Court has taken judicial notice, that provides, *inter alia*, Robert  
11 Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail  
12 allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject  
13 to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and  
14 evidentiary support, the contradictory representations in the Gordon Declaration and  
15 the Gordon Initial Disclosures raises triable issues of material fact in this third-party  
16 action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

26 Defendant's Response to Plaintiff's Statement of Material Facts  
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1 Plaintiff's Fact #10:

2           Nowhere on any of these websites was Mr. Gordon asked to give his consent  
3  
4 to receive any commercial email from Defendant. Gordon Declaration ¶ 11.

5 Response:

6           Genuine issues of material fact exist regarding Plaintiff's Fact #10.  
7  
8 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,  
9 Third-Party Defendants, or anyone else allegedly received the commercial e-mail  
10 messages at issue; (b) whether or not Defendant transmitted the alleged emails at  
11 issue; (c) whether or not the emails at issue violated Washington law; (d) whether  
12 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing  
13 partners, with untruthful and inaccurate registration information; and (e) whether  
14 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse  
15 and/or its marketing partners.  
16  
17  
18

19           Further, the Court is respectfully referred to the Gordon Initial Disclosures  
20 attached to Bodie Declaration, of which this Court has taken judicial notice, that  
21 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,  
22 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon  
23 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the  
24  
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disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30. In support of Defendant's contention that a material issue of fact exists with respect to Plaintiff's Fact #10, this Court is respectfully referred to: (a) page 9, lines 17-19 of Plaintiff's Statement, wherein Plaintiff admits that Defendant's counterclaims and third-party claims contain allegations contrary to this fact; (b) Defendant's First Amended Counterclaim ¶¶ 1-15; (c) Defendant's Fourth Amended Counterclaim ¶ 33; (d) Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; (e) Exhibit F of the Declaration of Phil Huston in support of Impulse's Motion to Dismiss Plaintiff's Complaint (the "Huston Declaration"); (f) ¶¶ 22 and 23 of the Huston Declaration; and (g) ¶ 48 of the Bodie Declaration.

Plaintiff's Fact #11:

At not time did Mr. Gordon give his consent to receive any commercial email from the Defendant. Gordon Declaration ¶ 11.

Response:

Defendant's Response to Plaintiff's Statement of Material Facts  
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1       Genuine issues of material fact exist regarding Plaintiff's Fact #11.  
 2  
 3       Specifically, there are genuine issues of material fact as to: (a) whether Gordon,  
 4       Third-Party Defendants, or anyone else allegedly received the commercial e-mail  
 5       messages at issue; (b) whether or not Defendant transmitted the alleged emails at  
 6       issue; (c) whether or not the emails at issue violated Washington law; (d) whether  
 7       Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing  
 8       partners, with untruthful and inaccurate registration information; and (e) whether  
 9       Gordon and/or Third-Party Defendants misrepresented their identities to Impulse  
 10       and/or its marketing partners.

13       Further, the Court is respectfully referred to the Gordon Initial Disclosures  
 14       attached to Bodie Declaration, of which this Court has taken judicial notice, that  
 15       provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,  
 16       received commercial e-mail. (emphasis added). As the Gordon Initial Disclosures  
 17       were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable  
 18       inquiry and evidentiary support, the contradictory representations in the Gordon  
 19       Declaration and the Gordon Initial Disclosures raises triable issues of material fact  
 20       in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26,  
 21       29 and 30.

26       Defendant's Response to Plaintiff's Statement of Material Facts  
 27       and Motion to Strike Statement of Facts - 17

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1 In support of Defendant's contention that material issues of fact exist with  
 2 respect to Plaintiff's Fact #11, this Court is respectfully referred to: (a) page 10,  
 3 lines 10-14 of Plaintiff's Statement, wherein Plaintiff admits that Defendant has  
 4 contested this fact at paragraph 48 of the Bodie Declaration; (b) Defendant's First  
 5 Amended Counterclaim ¶¶ 1-15; (c) Defendant's Fourth Amended Counterclaim ¶  
 6 33; (d) Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; (e) Exhibit F to the  
 7 Huston Declaration; (f) ¶¶ 22 and 23 of the Huston Declaration; and (g) ¶ 48 of the  
 8 Bodie Declaration.

9 Plaintiff's Fact # 12:

10 Almost immediately after Mr. Gordon had filled out the online forms which  
 11 purported to offer free products, Mr. Gordon began to receive a torrent of  
 12 commercial email from the Defendant at the email addresses Mr. Gordon had used  
 13 to try to accept the offers for free prizes. Gordon Declaration, ¶ 12.

14 Response:

15 Genuine issues of material fact exist regarding Plaintiff's Fact #12.  
 16 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,  
 17 Third-Party Defendants, or anyone else allegedly received the commercial e-mail  
 18 messages at issue; (b) whether or not Defendant transmitted the alleged emails at

1 issue; (c) whether or not the emails at issue violated Washington law; (d) whether  
 2 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing  
 3 partners, with untruthful and inaccurate registration information; and (e) whether  
 4 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse  
 5 and/or its marketing partners. Further, the Court is respectfully referred to the  
 6 Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has  
 7 taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey,  
 8 rather than Gordon himself, received commercial e-mail allegedly at issue.  
 9 (emphasis added). Defendant's First Amended Counterclaim ¶¶ 1-15; Defendant's  
 10 Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21  
 11 and 38. As the Gordon Initial Disclosures were subject to F.R.C.P. § 11 requiring,  
 12 at the time of the disclosure, reasonable inquiry and evidentiary support, the  
 13 contradictory representations in the Gordon Declaration and the Gordon Initial  
 14 Disclosures raises triable issues of material fact in this third-party action and  
 15 counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

1 Plaintiff's Fact #13:

2 Within a few weeks of his requests for free products, Mr. Gordon attempted  
3  
4 to stop the resulting torrent of commercial email by unsubscribing from these email  
5 lists. Gordon Declaration, ¶ 13.

6 Response:

7  
8 A genuine issue of material fact exists regarding Plaintiff's Fact #13.  
9 Specifically, there is a genuine issue of material fact as to if and when Gordon  
10 and/or his family member's "opted-in" again after such "opt-out" occurred. Bodie  
11 Declaration ¶ 35.

12 Plaintiff's Fact #14:

13  
14 In October of 2003, Mr. Gordon began submitting "unsubscribe" requests to  
15 the Defendants, and continued to do so through Spring of 2005. Gordon  
16 Declaration, ¶ 14.

17 Response:

18  
19 Based upon the lack of any discovery in this lawsuit, Defendant denies  
20 knowledge or information as to Plaintiff's Fact #14. Further genuine questions of  
21 material fact exist regarding Plaintiff's Fact #14. Specifically, there are genuine  
22 issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone  
23  
24  
25

1 else submitted “unsubscribe” requests to anyone, let alone the Defendant; (b)  
 2 whether Gordon, Third-party Defendants, or anyone else allegedly received the  
 3 commercial e-mail messages at issue; (c) whether or not Defendant transmitted the  
 4 alleged emails at issue; (d) whether or not the emails at issue violated Washington  
 5 law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or  
 6 its marketing partners, with untruthful and inaccurate registration information; and  
 7 (f) whether Gordon and/or Third-Party Defendants misrepresented their identities  
 8 to Impulse and/or its marketing partners. Defendant’s First Amended Counterclaim  
 9 ¶¶ 1-15; Defendant’s Fourth Amended Counterclaim ¶ 33; Defendant’s Third-Party  
 10 Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit “F.”

11 Further, the Court is respectfully referred to the Gordon Initial Disclosures  
 12 attached to Bodie Declaration, of which this Court has taken judicial notice, that  
 13 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,  
 14 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon  
 15 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the  
 16 disclosure, reasonable inquiry and evidentiary support, the contradictory  
 17 representations in the Gordon Declaration and the Gordon Initial Disclosures raises  
 18

1 triable issues of material fact in this third-party action and counterclaims.

2 Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

3  
4 Plaintiff's Fact #15:

5 Exhibit F of the Declaration of Phil Huston filed with the Court January 21,  
6 2005, shows that the Plaintiff "opted out" of receiving future commercial emails  
7 from the Defendant on October 15, 2003.

8  
9 Response:

10  
11 A genuine issue of material fact exists regarding Plaintiff's Fact #15.  
12 Specifically, there is a genuine issue of material fact as to whether Plaintiff "opted  
13 out" of receiving future commercial emails from the Defendant on October 15, 2003.  
14 Contrary to Plaintiff's Fact #15, Exhibit "F" does not reflect that Gordon and/or his  
15 family members "opted-out" to receiving "all" e-mails. Rather, Exhibit "F" of the  
16 Huston Declaration supports the proposition that "some" of the e-mails had been  
17 requested to be stopped being transmitted. Bodie Declaration ¶¶ 32-35.

18  
19  
20 Plaintiff's Fact #16:

21  
22 Mr. Gordon's "unsubscribe" requests were ignored, and in fact, the amount  
23 of emails Mr. Gordon received increased after these requests were sent.

24  
25 Response:

26 Defendant's Response to Plaintiff's Statement of Material Facts  
27 and Motion to Strike Statement of Facts - 22

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Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else submitted “unsubscribe” requests to anyone, let alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (c) whether or not Defendant transmitted the alleged emails at issue; (d) whether or not the emails at issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (f) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant’s First Amended Counterclaim ¶¶ 1-15; Defendant’s Fourth Amended Counterclaim ¶ 33; Defendant’s Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit “F.”

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory

1 representations in the Gordon Declaration and the Gordon Initial Disclosures raises  
2 triable issues of material fact in this third-party action and counterclaims.  
3  
4 Declaration of James Bodie ¶¶ 25, 26, 29 and 30. Frankly, Defendant has no  
5 knowledge of what emails and unsubscribe requests Plaintiff refers to.  
6

7 Plaintiff's Fact #17:

8 All of the emails that form the basis for Mr. Gordon's lawsuit against the  
9 Defendant were received by Mr. Gordon after Mr. Gordon had submitted these  
10 "unsubscribe" requests.  
11

12 Response:

13 There are genuine issues of material fact as to: (a) whether Gordon, Third-  
14 Party Defendants, or anyone else submitted "unsubscribe" requests to anyone, let  
15 alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else  
16 allegedly received the commercial e-mail messages at issue; (c) whether or not  
17 Defendant transmitted the alleged emails at issue; (d) whether or not the emails at  
18 issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants  
19 provided Impulse, and/or its marketing partners, with untruthful and inaccurate  
20 registration information; and (f) whether Gordon and/or Third-Party Defendants  
21 misrepresented their identities to Impulse and/or its marketing partners. Defendant's  
22  
23  
24  
25



1 First Amended Counterclaim ¶¶ 1-15; Defendant's Fourth Amended Counterclaim  
 2 ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration,  
 3 Exhibit "F."

4  
 5 Further, the Court is respectfully referred to the Gordon Initial Disclosures  
 6 attached to Bodie Declaration, of which this Court has taken judicial notice, that  
 7 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,  
 8 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon  
 9 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the  
 10 disclosure, reasonable inquiry and evidentiary support, the contradictory  
 11 representations in the Gordon Declaration and the Gordon Initial Disclosures raises  
 12 triable issues of material fact in this third-party action and counterclaims.  
 13 Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

14  
 15  
 16 Plaintiff's Fact #18:

17  
 18 Throughout the fall of 2003, Mr. Gordon continued to receive emails from the  
 19 Defendant, and Mr. Gordon brought complaints about this unwanted and ongoing  
 20 commercial email to the Federal Trade Commission, the Attorney General for  
 21 Washington State, Tier 1 backbone internet providers, Mr. Gordon's local ISP, and  
 22 the local, Richland, Washington police department. Gordon Declaration, ¶ 17.

23  
 24  
 25  
 26 Defendant's Response to Plaintiff's Statement of Material Facts  
 27 and Motion to Strike Statement of Facts - 25

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1 Response

2 Based upon the lack of any discovery in this lawsuit, Defendant denies  
3 knowledge or information as to whether Mr. Gordon brought complaints about  
4 unwanted and ongoing commercial email to the Federal Trade Commission, the  
5 Attorney General for Washington State, Tier 1 Backbone Internet Providers and the  
6 local, Richland, Washington police department  
7

8 Further, any factual evidence that Mr. Gordon brought complaints about  
9 unwanted and ongoing commercial email to the Federal Trade Commission, the  
10 Attorney General for Washington State, Tier 1 Backbone Internet Providers and the  
11 local, Richland, Washington police department is: (a) hearsay; and (b) immaterial  
12 to Defendant's Amended Counterclaims and Third-Party Amended Complaint.  
13

14 Notwithstanding the foregoing, there are genuine issues of material fact as to:  
15 (a) whether Gordon, Third-Party Defendants, or anyone else submitted  
16 "unsubscribe" requests to anyone, let alone the Defendant; (b) whether Gordon,  
17 Third-party Defendants, or anyone else allegedly received the commercial e-mail  
18 messages at issue; (c) whether or not Defendant transmitted the alleged emails at  
19 issue; (d) whether or not the emails at issue violated Washington law; (e) whether  
20 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing  
21

1 partners, with untruthful and inaccurate registration information; and (f) whether  
 2 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse  
 3 and/or its marketing partners. Defendant's First Amended Counterclaim ¶¶ 1-15;  
 4 Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party  
 5 Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit "F."

6  
 7  
 8 Further, the Court is respectfully referred to the Gordon Initial Disclosures  
 9 attached to Bodie Declaration, of which this Court has taken judicial notice, that  
 10 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,  
 11 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon  
 12 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the  
 13 disclosure, reasonable inquiry and evidentiary support, the contradictory  
 14 representations in the Gordon Declaration and the Gordon Initial Disclosures raises  
 15 triable issues of material fact in this third-party action and counterclaims.  
 16 Declaration of James Bodie ¶¶ 25, 26, 29 and 30. Frankly, Defendant has no  
 17 knowledge of what emails Plaintiff refers to.

18  
 19  
 20  
 21 Plaintiff's Fact #19:

22  
 23 At the local Richland, Washington police department, Mr. Gordon was put in  
 24 contact with Officer Lew Reed, a police officer specializing in cybercrimes  
 25

26 Defendant's Response to Plaintiff's Statement of Material Facts  
 27 and Motion to Strike Statement of Facts - 27

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1 investigations. Officer Reed personally examined about 2,000 emails sent by the  
2 Defendant, and confirmed to Mr. Gordon that information in the transmission paths  
3 of the emails in question had been omitted and/or mischaracterized. Gordon  
4 Declaration, ¶ 18.

5  
6 Response:

7  
8 Based upon the lack of any discovery in this lawsuit as well as Plaintiff's  
9 refusal to provide us with the allegedly violative emails at issue, Defendant denies  
10 knowledge or information as to Plaintiff's Fact #19. Defendant further objects and  
11 moves to strike Plaintiff's Fact #19 on the ground that such a factual representation  
12 is immaterial, contains hearsay and is thus inadmissible.  
13

14  
15 Plaintiff's Fact #20:

16 In November of 2004, having confirmed that the emails in question violated  
17 RCW 19.190 et seq., and having exhausted all avenues Mr. Gordon could conceive  
18 of to stop the sending of this illegal spam to his domain short of litigation, Mr.  
19 Gordon brought this suit against the Defendant. Gordon Declaration, ¶ 19.

20  
21 Response:

22  
23 Based upon the lack of any discovery in this lawsuit and Plaintiff's refusal to  
24 provide Defendant with the alleged violative emails, Defendant denies knowledge  
25

1 or information as to Plaintiff's Fact #20 but does not contest that Mr. Gordon  
2 brought suit against the Defendant. Further, Defendant objects and moves to strike  
3 Plaintiff's Fact #20 on the grounds that such a factual representation violates Local  
4 Rule 56.1(a) because: (a) it is immaterial to Defendant's amended counterclaims and  
5 third-party amended complaint; and (b) it contains inappropriate legal conclusions,  
6  
7 argument and comment.  
8

9 Plaintiff's Fact #21:

10  
11 Despite all of these efforts, and the fact that Mr. Gordon's lawsuit against the  
12 Defendant has been pending for 10 months, to this day the Defendant continues to  
13 send Mr. Gordon commercial email that violates RCW 19.190 et seq. Gordon  
14 Declaration ¶ 20.  
15

16 Response:

17  
18 Defendant objects and moves to strike Plaintiff's Fact #21 on the ground that  
19 such a statement is an opinion as well as an invalid statement and inappropriate legal  
20 conclusion pursuant to Local Rule 56.  
21  
22  
23  
24  
25

1 Plaintiff's Fact #22:

2 In his prior lawsuit against Commonwealth Marketing Group, Inc., Mr.  
3 Gordon identified his wife, Mrs. Bonnie Gordon; his children, Mr. James. S. Gordon  
4 III, Mr. Jonathan Gordon, and Ms. Jamila Gordon; his friends, Mr. Robert Pritchett,  
5 and Ms. Emily Abbey; and Officer Lew Reed as witnesses.  
6  
7

8 Response:

9 Defendant does not dispute that in his prior lawsuit against Commonwealth  
10 Marketing Group, Inc., Mr. Gordon identified his wife, Mrs. Bonnie Gordon; his  
11 children, Mr. James. S. Gordon III, Mr. Jonathan Gordon, and Ms. Jamila Gordon;  
12 his friends, Mr. Robert Pritchett, and Ms. Emily Abbey; and Officer Lew Reed as  
13 witnesses.  
14  
15

16 Plaintiff's Fact #23:

17 Defendant has now sued all of these individuals as "Third Party Defendants,"  
18 although the Defendant has moved to dismiss Officer Lew Reed.  
19

20 Response:

21 Defendant does not dispute that it has now sued all of these individuals as  
22 "Third Party Defendants" based upon: (a) their participation in a scheme to, *inter*  
23 *alia*, defraud Defendant; and (b) their providing Defendant with inaccurate and  
24  
25

1 untruthful information. Defendant has moved to dismiss Officer Lew Reed. Mr.  
 2 Reed's dismissal was granted by this Court.  
 3

4 Plaintiff's Fact #23:<sup>1</sup>

5 To the extent that Mr. Gordon ever had any conversations with any of the  
 6 Third Party Defendants related to commercial emails sent by the Defendant, Mr.  
 7 Gordon expressed his desire that they stop sending these emails, and his frustration  
 8 that the Defendant would not. Gordon Declaration, ¶24.  
 9

10 Response:

11 To the extent that the Defendant can make sense out of the awkward sentence  
 12 structure contained in Plaintiff's Fact #23, Defendant objects and moves to strike  
 13 Plaintiff's Fact #23 on the ground that such a factual representation is inadmissible  
 14 as hearsay.  
 15

16 Plaintiff's Fact #24:

17 To the best of Mr. Gordon's knowledge, at no time have any of the Third  
 18 Party Defendants ever solicited any of the commercial email to the  
 19 "gordonworks.com" email addresses that form the basis of this lawsuit.  
 20

21 Response:

22  
 23  
 24  
 25 <sup>1</sup> Please be advised that Plaintiff has erroneously set forth two (2) factual statements that contain the heading "Plaintiff's  
 26 Fact #23."

1 A genuine issue of material fact exists regarding Plaintiff's Fact #24.  
 2 Specifically, there is a genuine issue of material fact as to whether any of the Third  
 3 Party Defendants ever solicited any of the commercial email to the  
 4 "gordonworks.com" email addresses. In support of Defendant's contention that a  
 5 material issue of fact exists with respect to Plaintiff's Fact #24, this Court is  
 6 respectfully referred to: (a) page 16 of Plaintiff's Statement, wherein Plaintiff admits  
 7 that Defendant's counterclaims and third-party claims contain allegations contrary  
 8 to this fact; (b) Defendant's Third-Party Complaint ¶¶ 1, 2, 8, 11, 15-21, 31 and 44;  
 9 and (c) ¶ 20 of the Bodie Declaration.

10 Plaintiff's Fact #25:

11 At no time did any of the Third Party Defendants and Mr. Gordon ever  
 12 discuss any "scheme" whereby they would solicit any commercial emails to any  
 13 "gordonworks.com" email address that forms the basis of this lawsuit, as such would  
 14 have been directly contrary to Mr. Gordon's often stated desire that the Defendant  
 15 stop sending me commercial email.

16 Gordon Declaration, ¶ 26.

17 Response:

18 Defendant's Response to Plaintiff's Statement of Material Facts  
 19 and Motion to Strike Statement of Facts - 32

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1 Defendant denies Plaintiff's Fact #25. First, Gordon lacks standing to submit  
2 the Statement on behalf of the Third-Party Defendants because: (1) Gordon does not  
3 have a personal stake in the outcome of the third-party action; (2) there is no direct  
4 relationship between the factual claims asserted against Gordon and those brought  
5 against Third-Party Defendants; (3) Gordon cannot bind Third-Party Defendants to  
6 his representations, admissions and positions; and (4) the interests of Gordon and  
7 Third-Party Defendants may vary. Bodie Declaration ¶¶ 3-5.  
8  
9  
10

11 Second, Impulse alleges that: (a) Third Party Defendants assisted in the  
12 transmission of commercial electronic messages to the "gordonworks.com" domain  
13 (the "Domain") by actively and affirmatively soliciting commercial emails for the  
14 sole purpose of filing multiple lawsuits arising out of the receipt of these  
15 commercial email messages (the "Scheme"); (b) Third Party Defendants knew or  
16 consciously avoided knowing that by actively and affirmatively soliciting  
17 commercial emails for the sole purpose of filing multiple lawsuits arising out of the  
18 receipt of these commercial email messages that they would receive commercial  
19 email messages to the Domain; (c) Third Party Defendants provided substantial  
20 assistance or support that enabled the formulation, composition, origination,  
21 initiation, or transmission of commercial email messages to the Domain; (d) Third  
22  
23  
24  
25

1 Party Defendants knew or consciously avoided knowing that they were participating  
 2 in the Scheme; and (e) Third Party Defendants knew or consciously avoided  
 3 knowing that Plaintiff was providing Third Party Plaintiff with inaccurate and  
 4 untruthful registration information. Defendant's third-party amended complaint ¶¶  
 5 1-5.  
 6

7  
 8 Plaintiff's Fact #26:

9 The Defendant's claims against the Third Party Defendants thus appear to be  
 10 nothing more than an attempt to harm Mr. Gordon by exposing his friends, family  
 11 and law enforcement witnesses to the costs of defending themselves in civil  
 12 litigation. Gordon Declaration, ¶ 27.  
 13

14  
 15 Response:

16 Defendant objects and moves to strike Plaintiff's Fact #26 as containing  
 17 inappropriate narrative, comment and hyperbole in violation of Local Rule 56.1(a).  
 18

19 Defendant's Fact #1:

20 The Defendant has alleged that "to the extent any emails referenced in  
 21 Gordon's complaint are indirectly attributable to Impulse, said emails were  
 22 transmitted by CMG." Bodie Declaration ¶ 7.  
 23

24  
 25 Response:

26 Defendant's Response to Plaintiff's Statement of Material Facts  
 27 and Motion to Strike Statement of Facts - 34

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1 Defendant maintains that the Bodie Declaration speaks for itself. ¶ 7 of the  
2 Bodie Declaration.

3  
4 Dated: October 14, 2005

5 s/ Floyd E. Ivey  
6 Liebler, Ivey, Conner, Berry & St. Hilaire  
7 By: Floyd E. Ivey  
8 1141 N. Edison, Suite C  
9 P.O. Box 6125  
10 Kennewick, Washington 99336  
11 Local Counsel for Defendant  
12 Impulse Marketing Group, Inc.

13 s/ Sean A. Moynihan & s/ Peter J. Glantz  
14 Sean A. Moynihan, Esq. & Peter J. Glantz  
15 (admitted pro hac vice)  
16 Klein, Zelman, Rothermel & Dichter, LLP  
17 485 Madison Avenue, 15<sup>th</sup> Floor  
18 New York, NY 10022  
19 (212) 935-6020  
20 (212) 753-8101 Fax  
21 Attorneys for Defendant  
22 Impulse Marketing Group, Inc.

23 I hereby certify that on October 14, 2005, I electronically filed  
24 **Defendant's Response to Plaintiff's Statement of Material Facts and Motion**  
25 **to Strike Statement of Facts** with the Clerk of the Court using the CM/ECF  
26 System which will send notification of such filing to Douglas E. McKinley, Jr.,  
27 Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served the  
28 foregoing to the following non-CM/ECF participants by other means: Bonnie  
Gordon, Jonathan Gordon, James S. Gordon, III and Robert Prichett. I hereby  
certify that I have served the foregoing to the following persons who are non-  
CM/ECF participants named in this lawsuit, but who have not yet been served or  
entered an appearance in this lawsuit by other means: Emily Abbey and Jamila

26 Defendant's Response to Plaintiff's Statement of Material Facts  
27 and Motion to Strike Statement of Facts - 35

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1 Gordon.

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26 Defendant's Response to Plaintiff's Statement of Material Facts  
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